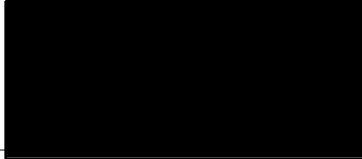




**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



DECISION

MDV/166650

The attached proposed decision of the hearing examiner dated July 30, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

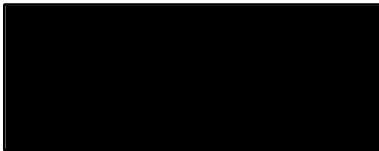
PRELIMINARY RECITALS

Pursuant to a petition filed June 16, 2015, under Wis. Stat., §49.45(5), to review a decision by Milwaukee Enrollment Services to deny Medical Assistance (MA), a hearing was held on July 22, 2015, by telephone. A hearing set for July 7, 2015 was rescheduled at the petitioner's request.

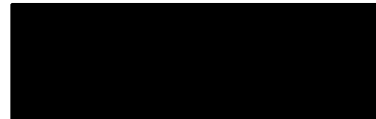
The issue for determination is whether a transaction between petitioner's wife and a trust is a divestment.

PARTIES IN INTEREST:

Petitioner:




Petitioner's Representative:



Respondent:


Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: 
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ) is a resident of Milwaukee County.
2. An application for nursing home MA was filed on petitioner's behalf on May 12, 2015, seeking MA retroactive to April 1, 2015.

3. On April 7, 2015, petitioner's wife created an irrevocable family trust. Exhibit F. The initial value of the trust is listed as ten dollars. No portion of the trust is payable to petitioner or on his behalf.
4. Also on April 7, 2015, petitioner's wife transferred \$500,112.60 to the trust in return for a promissory note. The note called for the trust to pay petitioner's wife \$41,784.52 per month for twelve months. Exhibit G. The note specifies that it is non-salable.
5. The agency determined that the transfer to the trust was a divestment. By notices dated May 15, 2015, the agency informed petitioner that nursing home MA was denied due to divestment, with a penalty period running from April 1, 2015 through November 27, 2020. Petitioner was found to be eligible for MA for medical services. Exhibits R-3, R-4, and R-5.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat., §49.453(2)(a); Wis. Admin. Code, §DHS 103.065(4)(a); MA Handbook, Appendix 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient (\$241.78 in 2015). MA Handbook, App. 17.5.2. The penalty period begins the month in which the person applies and meets all other MA eligibility requirements. MA Handbook, App. 17.5.3.

Wis. Stat. § 49.454 applies to trusts established by an individual or his or her spouse with assets of the individual or his or her spouse. Wis. Stat., §49.454(3) provides with regard irrevocable trusts:

For purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

(a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:

1. To or for the benefit of the individual, are considered income of the individual.
2. For any other purpose, are considered transfers of assets by the individual subject to s. 49.453.

The MA Handbook, App. 17.13.3, interprets the statute:

The following actions are divestment if they took place during the lookback period or any time after:

1. An irrevocable trust was created. The divested amount is the total amount of the created trust....
2. Funds were added to the irrevocable trust. The *divested amount* is the amount of the added funds.

Underlining and italics in original. A second statutory section is at issue in this case. Wis. Stat., 49.453(4)(ag) provides:

For the purposes of sub. (2) [the divestment provision], whenever a covered individual or his or her spouse, or another person acting on behalf of the covered

individual or his or her spouse, transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

a. For an annuity, promissory note or similar instrument that is not specified under subd. 1. b. or par (am), the applicable federal rate required under section 1274(d) of the Internal Revenue Code, as defined in s. 71.01(6)....

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate.

See also the MA Handbook, App. 17.12.2. Essentially, if funds are loaned via a promissory note that has an actuarially sound repayment term, provides for equal payments, and does not allow for cancellation upon the lender's death, the loan is not a divestment.

This case involves a combination of the creation of an irrevocable trust and subsequent transfer of funds into it, and also a promissory note. The agency has taken the position that the transfer of the funds to the irrevocable trust is a divestment regardless of the note. Petitioner argues that the note is a valid use of the funds regardless of its maker.

I am aware of a similar case, with [REDACTED] representing the petitioner, case no. MDV-163634. That decision concluded that the transfer to the irrevocable trust took precedence over the note, and therefore a divestment occurred. Another decision issued July 21, 2015 in case no. MDV-165574 found a similar transaction to be a divestment.

I conclude that the prior decisions were correct. It is clear that a transfer of property to an irrevocable trust is a divestment. It also is true that an actuarially sound promissory note is not a divestment. In a situation like this, where both types of transactions occurred, the issue becomes which provision takes precedence. The Wisconsin Court of Appeals has already provided the answer. In *Estate of Gerald Gonwa v. Wisconsin Department of Health and Family Services*, 265 Wis. 2d 913 (Ct. App. 2003) petitioner transferred funds to an irrevocable trust through a private annuity. The legal issue was whether the trust provisions were to be given precedence over the general transfer of assets provisions. The Court agreed with the Department that regardless of whether the asset held in an irrevocable trust is transferred as an annuity, it is nevertheless held in an irrevocable trust and § 49.454 determines the outcome. Therefore, it held that a divestment occurred despite the fact that the terms of the annuity itself met transfer of asset requirements. Here Petitioner used a promissory note rather than an annuity as the means to transfer funds to the irrevocable trust. I do not find that to be a meaningful distinction because what matters is that the funds are held in an irrevocable trust.

The type of Medicaid planning attempted by Petitioner is precisely what Congress sought to prevent in its 1993 changes to Medicaid trusts. *Gonwa* quoted the House Committee on Energy and Commerce as follows:

The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State

resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

H.R. REP. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985)

In this case, the intent clearly is to divest over \$500,000 so that none of it will be used to pay for petitioner's nursing home care. Under the Spousal Impoverishment provisions of Wis. Stat., §49.455, if petitioner is found eligible for nursing home MA, monthly payments made to petitioner's wife will have no impact on petitioner's MA eligibility. Thus, in essence, petitioner's wife will have taken \$500,000 that could be used to pay for petitioner's care and made it unavailable to use for petitioner's care. That is a classic divestment.

Further evidence of the intent is that the promissory note is specifically non-negotiable, non-salable, and non-transferable. Under normal circumstances a note in itself would have value, but not if it cannot be sold. The only reason to put the non-sale provision in the note is to remove any value from the MA asset determination.

Under the clear language of Wis. Stat., §49.454, the money here was transferred to an irrevocable trust. None of the money transferred can be used for petitioner's benefit. Thus the transfer is a divestment. The fact that petitioner's wife, in her trustee role, agreed to pay the money to herself via a promissory note has no bearing on the divestment since the net effect is that the money has been taken away from petitioner and he has received nothing in return.

CONCLUSIONS OF LAW

A transfer of \$500,000 into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner.

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 and to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

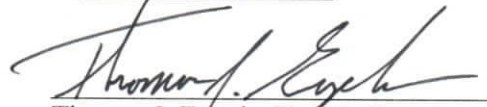
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 23rd day
of October, 2015.


Thomas J. Engels, Deputy Secretary
Department of Health Services



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

PROPOSED DECISION

MDV/166650

PRELIMINARY RECITALS

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The issue for determination is whether a transaction between petitioner's wife and a trust is a divestment.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. An application for nursing home MA was filed on petitioner's behalf on May 12, 2015, seeking MA retroactive to April 1, 2015.
3. On April 7, 2015, petitioner's wife created an irrevocable family trust. Exhibit F. The initial value of the trust is listed as ten dollars. No portion of the trust is payable to petitioner or on his behalf.

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DISCUSSION

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than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:

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See also the MA Handbook, App. 17.12.2. Essentially, if funds are loaned via a promissory note that has an actuarially sound repayment term, provides for equal payments, and does not allow for cancellation upon the lender's death, the loan is not a divestment.

This case involves a combination of the creation of an irrevocable trust and subsequent transfer of funds into it, and also a promissory note. The agency has taken the position that the transfer of the funds to the irrevocable trust is a divestment regardless of the note. Petitioner argues that the note is a valid use of the funds regardless of its maker.

I am aware of a similar case, with [REDACTED] representing the petitioner, which recently was issued as a proposed decision to the Department's Deputy Secretary for further consideration, case no. MDV-163634 (proposed decision on rehearing dated 7/20/15). That decision concluded that the transfer to the irrevocable trust took precedence over the note, and therefore a divestment occurred. Another proposed decision issued July 21, 2015 in case no. MDV-165574 found a similar transaction to be a divestment.

I conclude that the prior decisions now before the Deputy Secretary were correct. My reasoning goes further, however. It is clear that a transfer of property to an irrevocable trust is a divestment. It also is true that an actuarially sound promissory note is not a divestment. In a situation like this, where both types of transactions occurred, I believe the analysis should be the intent of the transactions. In this case, the intent clearly is to divest over \$500,000 so that none of it will be used to pay for petitioner's nursing home care. Under the Spousal Impoverishment provisions of Wis. Stat., §49.445, if petitioner is found eligible for nursing home MA, monthly payments made to petitioner's wife will have no impact on petitioner's MA eligibility. Thus, in essence, petitioner's wife will have taken \$500,000 that could be used to pay for petitioner's care and made it unavailable to use for petitioner's care. That is a classic divestment.

Further evidence of the intent is that the promissory note is specifically non-negotiable, non-salable, and non-transferable. Under normal circumstances a note in itself would have value, but not if it cannot be sold. The only reason to put the non-sale provision in the note is to remove any value from the MA asset determination.

Under the clear language of Wis. Stat., §49.454, the money here was transferred to an irrevocable trust. None of the money transferred can be used for petitioner's benefit. Thus the transfer is a divestment under Wis. Stat., §49.453. The fact that petitioner's wife, in her trustee role, agreed to pay the money to herself via a promissory note has no bearing on the divestment since the net effect is that the money has been taken away from petitioner and he has received nothing in return.

CONCLUSIONS OF LAW

A transfer of \$500,000 into an irrevocable trust is a divestment regardless of a concurrent transaction that would have the trustee make periodic payments under a promissory note to someone other than the petitioner.

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 30 day of July, 2015



Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals